

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 16, 2008

STATE OF TENNESSEE v. SHAWN MITCHELL

Direct Appeal from the Circuit Court for Giles County
Nos. 10088, 10703, 12153, and 12154 Stella Hargrove, Judge

No. M2008-00913-CCA-R3-CD - Filed September 24, 2009

Defendant, Shawn Mitchell, appeals the trial court's revocation of his probation in case nos. 10088 and 10703. Defendant had incurred new charges of driving on a suspended license, resisting a stop and arrest, leaving the scene of an accident, felony evading arrest, misdemeanor evading arrest, failure to wear a seat belt, and failure to comply with the financial responsibility law. On appeal, Defendant argues that the trial court erred in revoking his probation and that he was denied due process during the revocation proceeding. After a thorough review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

Shara A. Flacy, Pulaski, Tennessee, for the appellant, Shawn Mithell.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilbur, Assistant Attorney General; T. Michel Bottoms, District Attorney General; and Patrick Butler, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

On August 28, 2001, Defendant entered a plea of guilty in case no. 10088 to aggravated robbery, a Class B felony. The trial court sentenced Defendant as a Range I, standard offender, to eight years, which was suspended after sixty days of confinement. On April 28, 2003, Defendant entered a plea of guilty in case no. 10703 to possession of less than 0.5 grams of cocaine with intent to sell, a Class C felony, and the trial court sentenced Defendant as a Range I, standard offender, to five years, all of which was suspended and Defendant placed on probation. The trial court ordered Defendant to serve his sentence in case no. 10703 concurrently with his sentence in case no. 10088. On July 21, 2005, Defendant's probation in case nos. 10088 and 10703 was revoked. Defendant

was ordered to serve thirty days in confinement after which he was again placed on probation. It appears from the record that Defendant's probation was again revoked in 2006 and reinstated to probation after serving thirty-five days.

On February 6, 2008, a petition to revoke Defendant's probation in case nos. 10703 and 10088 was filed alleging that Defendant had violated the conditions of his probation after he incurred new charges for driving on a suspended license, resisting a stop and arrest, leaving the scene of an accident, felony evading arrest, misdemeanor evading arrest, failure to wear a seat belt, and failure to comply with the financial responsibility law. Following a revocation hearing, the trial court revoked Defendant's probation in case nos. 10088 and 10703 and ordered him to serve the balance of his sentences in confinement.

Prior to the commencement of the revocation hearing, Defendant requested a continuance in order to procure the attendance of three character witnesses. Defendant also stated that he wanted to delay the hearing until he was indicted on the new charges so that all issues could be resolved at the same time. The trial court observed that Defendant was released from jail on bond on March 5, 2008, thirteen days before the revocation hearing and had the opportunity to secure the presence of his witnesses at the hearing. In response to the trial court's questions, Defendant said that he did not know for sure that the revocation hearing was scheduled for March 18, 2008, and thought the hearing was "to be put off." The trial court denied Defendant's request for a continuance, and the State called its witnesses. During the testimony of the second witness, however, Defendant's trial counsel, an Assistant District Public Defender, realized that the Public Defender's Office also represented Defendant's co-defendant on the new charges. Due to the conflict, counsel was allowed to withdraw as Defendant's counsel, and the trial court appointed substitute counsel, who was present in the courtroom, to represent Defendant. Defendant did not object to the appointment of substitute counsel.

The trial court called a recess in order to provide substitute counsel the opportunity to confer with Defendant. After the recess, Defendant renewed his motion for a continuance. Defendant reiterated that he wanted to call Will Mason, his employer; Mary Mitchell, his mother; and Reverend Martin Fowler as character witnesses at the revocation hearing. Defendant said that Mr. Mason was out of town on a business trip, and his mother was at work. Defendant acknowledged that he did not tell his proposed witnesses the date of the revocation hearing so they could plan to attend. Defendant also argued for the first time that he needed a continuance in order to retain private counsel to assist him at the revocation hearing. Substitute counsel informed the trial court that Defendant was currently employed so that it was possible that he could afford the services of counsel. Defendant stated that he had not had sufficient time to retain counsel although he had spoken to one attorney in Columbia after he was released on bond. The trial court denied Defendant's request for a continuance, and the revocation hearing was commenced anew without further objection by Defendant.

Theresa Frazier, a parole officer with the Tennessee Board of Probations and Parole, testified that she was assigned Defendant's case in October 2007. Ms. Frazier stated that she filed a probation

violation report on February 6, 2008, alleging that Defendant had violated the conditions of his probation by incurring new charges on January 20, 2008.

Officer Jesse Mills, with the Pulaski Police Department, testified that on January 20, 2008, he was driving south on Tanglewood Drive when he observed Defendant driving a Lincoln Towncar in the northbound lane. Officer Mills stated that he was aware that Defendant's driver's license had been suspended. Officer Mills turned his vehicle around in order to initiate a traffic stop of Defendant's vehicle. As he did so, Defendant sped away at an unsafe speed. Defendant made a right hand turn, and his vehicle hit a speed bump. Defendant lost control of his vehicle and struck four parked cars.

Officer Mills stated that Defendant continued to drive his vehicle, and the passenger side door opened. Defendant's vehicle struck another speed bump, and the passenger fell out of the vehicle. Defendant drove approximately ten feet and then jumped out of the driver's side with his vehicle still moving. The vehicle hit the curb and came to a stop in front of one of the apartment buildings. Officer Mills exited his patrol car and was joined by Sergeant Justin Young and Officer Chad Estes. Defendant ran approximately seventy-five feet before he became tangled in some vines and fell down. Defendant struggled momentarily and then cooperated with the police officers. Defendant later told Officer Mills that if he had not hit the other vehicle, the police officers would not have been able to catch him. Officer Mills stated that he charged Defendant with felony evading arrest, driving on a suspended license, misdemeanor evading arrest, resisting a stop and arrest, leaving the scene of an accident, violation of the financial responsibility law, and driving without a seatbelt. Officer Mills stated that children frequently played in the roadway and parking area of the complex, and other vehicles were in the area. On cross-examination, Officer Mills stated that the incident occurred at approximately 3:00 p.m. on a Sunday afternoon.

Sergeant Justin Young testified that he, Officer Mills, and Officer Estes were exiting the Tanglewood Apartments after responding to a call. Sergeant Young's patrol car was in the lead. As he exited the apartment complex, Sergeant Young observed Defendant pull into the complex. Sergeant Young stated that he had arrested Defendant the week before in the same vehicle, and he knew that Defendant's driver's license had been suspended. Sergeant Young radioed to the patrol car behind him and asked the officer to initiate a traffic stop of Defendant's vehicle. Sergeant Young turned his patrol car around at College Street and returned to the Tanglewood Apartments. Sergeant Young observed Defendant's vehicle traveling at a high rate of speed through the apartment complex. Sergeant Young said that he saw an individual jump out of the passenger side of Defendant's vehicle, and a few seconds later, Defendant exited the vehicle on the driver's side. On cross-examination, Sergeant Young said that he did not observe any children playing in the roadway or any other traffic at the time of the incident.

In response to the trial court's questions, Defendant said that he began working for a family friend after he was released on bond and earned \$7.50 an hour. Defendant stated that he was currently working thirty hours each week but believed that he was going to be placed on full-time status soon. Defendant said that he had wanted to call his employer as a witness at the revocation

hearing to confirm his employment and vouch for his character. Defendant said that his mother and minister would also testify that he was “being productive now,” paying his bills, and seeing his probation officer.

II. Due Process Violations

Defendant argues that his due process rights were violated because the trial court did not grant him a continuance in order to retain counsel and to enable him to present the testimony of his witnesses at the revocation hearing. Defendant also contends that his due process rights were violated when substitute counsel was appointed to represent him on the day of the hearing.

We note initially that the grant or denial of a continuance rests within the sound discretion of the trial court. State v. Rimmer, 250 S.W.3d 12, 40 (Tenn. 2008) (citing State v. Odom, 137 S.W.3d 572, 589 (Tenn. 2004)). The decision to deny a continuance will be reversed by this court “only if it appears that the trial court abused its discretion to the prejudice of the defendant.” Odom, 137 S.W.3d at 589 (citing State v. Hines, 919 S.W.2d 573, 579 (Tenn. 1995)). “An abuse of discretion is demonstrated by showing that the failure to grant a continuance denied defendant a fair trial or that it could be reasonably concluded that a different result would have followed had the continuance been granted.” Hines, 919 S.W.2d at 579 (citing State v. Wooden, 658 S.W.2d 553, 558 (Tenn. Crim. App. 1983)). When a defendant claims that the denial of a continuance constitutes a denial of due process or the right to counsel, then he or she must establish actual prejudice. Rimmer, 250 S.W.3d at 40 (citing Odom, 137 S.W.3d at 589).

A defendant who has been granted a suspended sentence and placed on probation has a conditional liberty interest that is protected by due process of law. See State v. Merriweather, 34 S.W.3d 881, 884 (Tenn. Crim. App. 2000); State v. Stubblefield, 953 S.W.2d 223, 225 (Tenn. Crim. App. 1997). In Black v. Romano, 471 U.S. 606, 613, 105 S. Ct. 2254 (1985), the United States Supreme Court reiterated that the due process rights given in a probation revocation proceeding are not as expansive as those rights afforded to defendants in criminal trials. The Court stated, “[O]ur precedents have sought to preserve the flexible, informal nature of the revocation hearing, which does not require the full panoply of procedural safeguards associated with a criminal trial.” Black, 471 U.S. at 613, 105 S. Ct. at 2258 (citing Gagnon v. Scarpelli, 411 U.S. 778, 787-90, 93 S. Ct. 1756, 1762-1764 (1973); Morrissey v. Brewer, 408 U.S. 471, 489-90, 92 S. Ct. 2593, 2604-05 (1972)). In Scarpelli, the Supreme Court set out the “minimum requirements of due process” for final probation revocation hearings:

(a) written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probationer or] parolee of evidence against him; (c) an opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds a good cause for not allowing confrontation); (e) a “neutral and detached” hearing body such as a traditional parole board, members of which need not be

judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking [probation or] parole.

Scarpelli, 411 U.S. at 786, 93 S. Ct. at 1761-62 (quoting Morrissey, 408 U.S.487, 489, 92 S. Ct. at 2603).

A. Presentation of Witnesses

Defendant argues that the trial court erred in not granting him a continuance so that he could subpoena Mr. Mason, his mother, and Reverend Fowler to testify at the hearing. Defendant told the trial court that Mr. Mason and his mother were unable to attend the hearing because Mr. Mason was out of town and Ms. Mitchell was at work. Defendant acknowledged, however, that he did not tell his proposed witnesses about the hearing date so that they could plan to attend. Defendant also conceded that Reverend Fowler could have attended the revocation hearing had he been alerted on the day of the hearing that his presence was needed. Defendant said that Mr. Mason would testify that Defendant was currently employed, and all three witnesses would testify as to Defendant's positive attributes such as the fact that he was "a good person," and that he was conducting himself responsibly. None of the potential witnesses, however, could testify about the sequence of events leading up to Defendant's arrest which was the basis for the revocation of Defendant's probation.

The trial court accepted Defendant's statement that he was gainfully employed. The trial court considered the purpose and scope of the missing witnesses' testimony and found that the character testimony of Mr. Mason, Ms. Mitchell, and Reverend Fowler would not have changed the result of the revocation hearing. See State v. Betty B. Hull, No. W2008-01012-CCA-R3-CD, 2009 WL 1181342, at *1 (Tenn. Crim. App., at Jackson, May 1, 2009), no perm. to appeal filed (finding that the defendant had failed to show that the results of her revocation hearing would have been different had she been granted a continuance to call a character witness). Based on our review, we conclude that Defendant has failed to establish that he was prejudiced by the trial court's denial of a continuance in order to subpoena these witnesses. See Rimmer, 250 S.W.3d at 40 (citing Odom, 137 S.W.3d at 589). Moreover, Defendant was extended the opportunity to present witnesses at the revocation hearing which was scheduled approximately six weeks after his arrest and thirteen days after he was released on bond. Although all three witnesses resided in Giles County, Defendant failed to alert them of the scheduled hearing date so that they could make arrangements to attend the hearing. Under the facts and circumstances presented in this case, we conclude that Defendant's due process rights were not violated. Defendant is not entitled to relief on this issue.

B. Private Counsel

Defendant argues that the trial court's failure to grant his motion for a continuance denied him his due process right to be represented by counsel of his choice rather than appointed counsel. We initially observe that the United States Supreme Court has stated that representation by counsel at a probation revocation proceeding is not per se constitutionally required. Scarpelli, 411 U.S. at 790, 93 S. Ct. at 1763 (noting that whether counsel is needed should be determined on a case-by-case

basis, with counsel being afforded the defendant as due process dictates). In Tennessee, the right to counsel in probationary revocations is statutory. T.C.A. § 40-35-311(b); Tenn. R. Sup. Ct. 13, § 1(d)(4). In general, “a criminal defendant who desires and is financially able to retain his own counsel ‘should be afforded a fair opportunity to secure counsel of his own choice.’” State v. Huskey, 82 S.W.3d 297, 304 (Tenn. Crim. App. 2002) (quoting Powell v. Alabama, 287 U.S. 45, 53, 53 S. Ct. 55, 58 (1932)). Nonetheless, our supreme court has instructed that:

“the right to retain counsel of one’s own choice is not absolute. The right ‘cannot be insisted upon in a manner that will obstruct an orderly procedure in courts of justice, and deprive such courts of the exercise of their inherent powers to control the same.’ The public has strong interest in the prompt, effective, and efficient administration of justice; the public’s interest in the dispensation of justice that is not unreasonably delayed has great force.”

State v. Zyla, 628 S.W.2d 39, 41-2 (Tenn. Crim. App. 1981) (quoting United States v. Burton, 584 F.2d 485, 489, 490 (D. C. Cir. 1978)).

Accordingly, the trial court’s action in matters regarding the appointment and relief of counsel will not be set aside on appeal absent a showing that the trial court abused its discretion. Huskey, 82 S.W.3d at 305; State v. Rubio, 746 S.W.2d 732, 737 (Tenn. Crim. App. 1987).

During the testimony of the second witness for the State, the Assistant District Public Defender assigned to Defendant’s case realized that he had a conflict of interest, and the trial court granted counsel’s motion to withdraw. The trial court observed that another attorney was present in the courtroom, and this attorney agreed to represent Defendant during the revocation hearing. Defendant did not object to the appointment of substitute counsel. The trial court granted a recess so that substitute counsel could confer with Defendant. Before the hearing resumed, Defendant moved for a continuance so that he might retain counsel to represent him. Substitute counsel informed the trial court that Defendant was now employed, and it was possible that he could afford the services of private counsel.

Defendant was arrested for violation of probation in case nos. 10088 and 10703 on February 7, 2008. The Public Defender’s Office was appointed to represent Defendant in the revocation proceedings on February 20, 2008. Defendant was released from jail on bond on March 5, 2008, and the revocation hearing was scheduled for March 18, 2008.

Defendant explained to the trial court that notwithstanding the lapse of nearly six weeks between his arrest and the scheduled date of the revocation hearing, he had not had sufficient time to hire private counsel. Defendant stated that he had talked to one attorney in Columbia about his case, but he could not remember the attorney’s name. Defendant believed that he would be able to pay for an attorney’s services because he had started working for a family friend after he was released from jail. Defendant acknowledged that he was only able to make bond because his employer loaned him \$10,000. Defendant stated that he contacted the Public Defender’s Office

when he was released from jail and was told “just to meet her up here” on the day of the hearing. Although Defendant maintained that he thought the revocation hearing was going “to be put off,” he understood that he would be represented by appointed counsel at this proceeding. Based on the foregoing, the trial court denied Defendant’s motion for a continuance and ordered the revocation hearing to commence without objection by Defendant.

The thrust of Defendant’s argument at the revocation hearing focused not on challenging the new charges which supported the revocation of his probation, but apparently on seeking leniency from the trial court. The trial court extended substitute counsel the opportunity to confer with Defendant. Substitute counsel cross-examined the State’s witnesses and ably argued in closing that the trial court should consider sentencing Defendant to a sentence of split confinement or a work release program so that Defendant could retain his employment. We conclude that Defendant has failed to show that he was prejudiced by the trial court’s denial of his request for a continuance in order to retain private counsel, or that the trial court abused its discretion in appointing substitute counsel to represent Defendant on the day of the revocation hearing.

Defendant was provided written notice of the alleged violations of probation, and the evidence supporting the allegations were made known to Defendant. Although he apparently took no steps to do so, Defendant was provided the opportunity to present witnesses, and was given the opportunity to interview and cross-examine the witnesses for the State. The hearing occurred before a neutral and detached hearing body “at the earliest practicable time” after Defendant’s arrest for violation of his probation. T.C.A. § 40-35-311(b). At the conclusion of the hearing, the trial court announced its factual findings from the bench and stated on the record the reason for the revocation. Accordingly, we conclude that Defendant was afforded due process of law required at a revocation hearing. See Scarpelli, 411 U.S. at 786, 93 S. Ct. at 1761-62. Defendant is not entitled to relief on this issue.

III. Revocation of Probation

Defendant argues that the record does not contain substantial evidence supporting the trial court’s finding that he had violated the conditions of his probation by incurring new charges. Specifically, Defendant contends that the trial court did not expressly state on the record that it found Officer Mills’s and Sergeant Young’s testimony credible, and the trial court did not provide a written statement of the reasons for revoking probation.

A trial court may revoke probation and order imposition of the original sentence upon a finding by a preponderance of the evidence that the person has violated a condition of probation. T.C.A. § 40-35-310, -311; State v. Shaffer, 45 S.W.3d 553, 554 (Tenn. 2001). This court reviews a revocation of probation under an abuse of discretion standard. Stubblefield, 953 S.W.2d at 226 (citing State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991); State v. Delp, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980)). This means that the trial court will be affirmed unless the record contains no substantial evidence to support the conclusion of the trial court. Harkins, 811 S.W.2d at 82. If the trial court finds by a preponderance of the evidence that the defendant has violated a condition of

probation, the court has the authority to revoke the probation and reinstate the judgment as originally entered. T.C.A. § 40-35-311(e).

A violation of probation warrant was issued against Defendant alleging that he had failed to “obey the law.” If the ground for revocation is based solely on the commission of a new offense, there must be more than a “mere accusation.” That is, the State is required to establish sufficient facts at the revocation hearing to enable the court to make a proper judgment as to whether the conduct in question violated the law. Harkins, 811 S.W.2d at 83 n. 3. Thus, the State must produce evidence in the usual form of testimony in order to establish the defendant’s commission of another offense. State v. Clyde T. Smith, M2002-00553-CCA-R3-CD, 2003 WL 140040, at *3 (Tenn. Crim. App., at Nashville, Jan. 21, 2003), no perm. to appeal filed. We have previously concluded that a police officer’s testimony about the facts surrounding the arrest used as the basis for the probation violation “constituted substantial evidence” and was “sufficient to support the trial court’s [revocation of probation].” State v. Chris Allen Dodson, M2005-01776-CCA-R3-CD, 2006 WL 1097497, at *3 (Tenn. Crim. App., at Nashville, Mar. 31, 2006), no perm. to appeal filed.

At the revocation hearing, Officer Mills and Sergeant Young testified about the circumstances leading up to Defendant’s arrest. The trial court found that there was substantial evidence before it to find that Defendant had violated his probation based on the new charges. The trial court found pertinent the fact that Defendant’s vehicle struck four other vehicles and that he jumped out of his vehicle while it was still moving. Although the trial court did not expressly find that the officers’ testimony was credible, it did so implicitly through its findings. Based on our review, we conclude that the evidence does not preponderate against the trial court’s finding that Defendant violated the terms of his probation by violating the law and that substantial evidence supports the trial court’s finding. Defendant is not entitled to relief on this issue.

Defendant also argues that the trial court erred in not reducing its oral findings from the bench to writing. While due process requires the court conducting the probation revocation hearing to make written findings of fact, Scarpelli, 411 U.S. at 786, 93 S. Ct. at 1761-62; Delp, 614 S.W.2d at 398, that requirement is satisfied by transcribed oral findings which create a sufficient record to notify the defendant of the reasons for the revocation and allow appellate review of the trial court’s decision. State v. Leiderman, 86 S.W.3d 584, 590-91 (Tenn. Crim. App. 2002). Based on our review, we conclude that the transcript demonstrates the trial court provided adequate findings at the conclusion of the revocation hearing showing both the grounds for the revocation and the reasons for the trial court’s finding, and that this is sufficient to satisfy the due process requirements of a “written statement.” Defendant is not entitled to relief on this issue.

CONCLUSION

After a thorough review, we affirm the judgment of the trial court.

THOMAS T. WOODALL, JUDGE

